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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 340

ETIENNE DUGAS,

Petitioner,

versus

AMERICAN SURETY COMPANY OF NEW YORK,

Respondent.

PETITION OF ETIENNE DUGAS FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT OF PETITION.

M. C. SCHARFF,
Attorney for Petitioner;

JAMES J. LANDRY,
IGNATIUS E. UZZO,
WILLIAM C. ORCHARD,
Of Counsel for Petitioner.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O. La.

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ETIENNE DUGAS,

Petitioner,

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AMERICAN SURETY COMPANY OF NEW YORK,

Respondent.

PETITION OF ETIENNE DUGAS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Now comes Etienne Dugas, a citizen of the United States, residing in the Parish of Iberia, State of Louisiana, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit, to remove therefrom, for review here, the record in the cause therein pending, numbered No. 7961,

wherein petitioner is the appellant, and respondent, the appellee, and shows:

I.

Petitioner had a claim for Workmen's Compensation insurance against the Lumbermen's Reciprocal Association, a Texas corporation doing business in Louisiana, which corporation had furnished a Twenty Thousand ($20,000.00) Dollar Bond required by the Law of Louisiana of foreign insurance companies for the privilege of doing business in Louisiana. The American Surety Company of New York was the surety on this bond. (R. 2)

II.

After the Lumbermen's Association had gone into the hands of the receiver, petitioner sued the American Surety Company in the State Court and obtained a judgment against the said Surety Company for Twenty ($20.00) Dollars per week during his disability, not to exceed Three (300) Hundred weeks, commencing on May 15, 1930, and for Two Hundred Fifty ($250.00) Dollars for medical bills. In the same judgment, the American Surety Company obtained a similar judgment against the Lumbermen's Association and its receiver. This judgment was signed on April 20, 1931. (R. 14 to 16)

III.

The American Surety Company took a suspensive appeal from the judgment of petitioner to the State Appellate Court in order to suspend and prevent the execution of petitioner's judgment and filed an appeal bond for Ten

Thousand ($10,000.00) Dollars with themselves as principal and the New York Casualty Company as surety, which appeal bond was conditioned in accordance with a Louisiana statute that the Surety Company should prosecute diligently its appeal and should satisfy whatever judgment rendered against it out of its estate, real or personal, otherwise that the surety, New York Casualty Company, should be liable in its place. (R. 16, 17).

IV.

The record was promptly filed in the State Appellate Court and before hearing by the State Court on the appeal, the respondent filed in the United States District Court for the Eastern District of Louisiana an interpleader suit, entitled "American Surety Company of New York v. Etienne Dugas, et al," depositing the amount of the qualifying bond, Twenty Thousand ($20,000.00) Dollars, and cited Dugas and many other defendants having claims against the American Surety Company by virtue of the qualifying bond it had signed for the Lumbermen's Association. (R. 2 to 11)

V.

Thereafter, on September 19, 1932, the District Court rendered a decree in accordance with the bill of respondent, declaring that the respondent had discharged in full its obligation under the Twenty Thousand ($20,000.00) Dollar qualifying bond and enjoined petitioner and the other defendants from taking any further proceedings against the respondent on account of this bond. (R. 32).

VI.

Petitioner was allowed, in the decree, a total sum of Four Thousand One Hundred Sixty and 68/100 ($4,160.68) Dollars which was computed by the Special Master, as follows: Twenty ($20.00) Dollars per week for One Hundred Twenty-seven (127) weeks, that is, from May 15, 1930, to the date of the first hearing before the Master, and Eight ($8.00) Dollars per week (40 per cent disability) for the remaining One Hundred Seventy-three weeks, being One Thousand Two Hundred Seventy-three and 28/100 ($1,273.28) Dollars (discounted at 8 per cent) plus Two Hundred Fifty ($250.00) Dollars for medical fees and Ninety-seven and 50/100 ($97.50) Dollars costs. (R. 34, 35).

VII.

Petitioner received from the pro rata distribution in the interpleader suit, One Thousand One Hundred Forty-one and 29/100 ($1,141.29) Dollars, leaving unpaid Three Thousand Nineteen and 39/100 ($3,019.39) Dollars of the amount fixed and recognized by the decree affirming the Special Master's report. (R. 36).

VIII.

Petitioner made demand for this balance upon the New York Casualty Company as surety on the State Court appeal bond of Ten Thousand ($10,000.00) Dollars. The New York Casualty Company denied liability and petitioner brought suit in the State Court against the said New York Casualty Company for the balance due of Three Thousand Nineteen and 39/100 ($3,019.39) Dollars, which was

later reduced to Two Thousand Nine Hundred Ninety-nine ($2,999.00) Dollars through the filing of a supplemental petition which was filed in order to avoid a removal of the suit to the Federal Court. (R. 58).

IX.

The New York Casualty Company, the only defendant in the suit referred to in paragraph VIII, filed in the State Court, pleas of prematurity, vagueness, estoppel and of no cause or right of action. The judge of the State Court of original jurisdiction, after hearing, sustained the plea of prematurity without passing upon the other pleas. (R. 58).

X.

Petitioner thereupon appealed to the Supreme Court of Louisiana, where, after due and thorough hearing, rendered an opinion and decree reversing the judgment of the lower State Court and remanding the case for further proceedings consistent with the views expressed in their opinion. This opinion set forth the obligation of both respondent and the New York Casualty Company under the statutory appeal bond and fully interpreted the Louisiana Statutes relating to appeal bonds. (R. 56 to 66).

XI.

The New York Casualty Company applied to the Supreme Court of Louisiana for a rehearing which was refused. (R. 66, 68).

XII.

During the pendency of the application of the New York Casualty Company for a rehearing in the State Su-

preme Court, respondent filed in the United States District Court a self styled "supplemental bill in aid of and to effectuate the original decree of this (United States District) Court, in this matter, dated September 19, 1932" which bill is the basis of the present action and which bill prayed that petitioner be enjoined from proceeding further in his suit in the State Court against the New York Casualty Company as surety upon the State Court Appeal Bond. (R. 68 to 78).

XIII.

Petitioner, on February 6, 1935, filed pleas to the jurisdiction (R. 79) and in the alternative, a plea that the District Court was without right to enjoin State Court Suit (R. 84) and a further plea of no right or cause of action on the part of the Surety Company (R. 89) and further after reserving the rights to said pleas or motions to dismiss and answer to the bill (R. 92).

XIV.

Thereafter, on February 13, 1935, after hearing on all pleas, the District Judge overruled all pleas and granted a preliminary injunction (R. 98) to all of which actions, proper bills of exceptions were reserved. (R. 82, 88, 91, 99).

XV.

By stipulation (R. 100) the matter was submitted on the merits on the same pleadings and evidence had and produced on the application for preliminary injunction and subject to the bills of exceptions of petitioner, and on February 25, 1935, a permanent injunction was granted (R.

101) and thereafter the District Judge on March 4, 1935, filed his "Findings of Fact and Conclusions of Law". (R. 103).

XVI.

Petitioner applied to the Circuit Court of Appeals for the Fifth Circuit on May 23, 1935, (R. 107) assigning as error the overrulings of his pleas to the jurisdiction, to the right of the Federal Court to enjoin the proceeding in the State Court, and of no right or cause of action by the respondent, and finally to the granting of the preliminary and permanent injunctions (R. 108, et seq.).

XVII.

The appeal was heard on February 27, 1936, by the Circuit Court of Appeals and on April 9th, 1936, the said Court affirmed the decree of the District Court, with Sibley, Circuit Judge, dissenting. (R. 119). Petition for rehearing was seasonably filed and rehearing denied on June 5, 1936. (R. 137).

XVIII.

The Circuit Court of Appeals affirmed the judgment of the District Court on the grounds that the supplemental bill was in aid of the enforcement of the original decree of September 19, 1932; that the liability on the appeal bond was a liability on account of the qualifying bond within the meaning of the provisions of the original decree in the interpleader suit, and that the attempt to collect from the surety on the appeal bond was an indirect attempt to proceed against the principal, respondent and appellee here.

XIX.

Petitioner avers the decision of the Circuit Court of Appeals is erroneous and that this Court should require the record in this case to be sent up for its review and determination according to the provisions of Title 28, Section 347, United States Code.

XX.

Petitioner avers that the Circuit Court of Appeals erred in holding the supplemental bill was ancillary to the original interpleader suit.

XXI.

Petitioner avers that the Circuit Court erred in holding that the appeal bond was an incident of the suit brought by petitioner against respondent for the full amount of petitioner's claim and that the liability on the appeal bond was a liability on account of the qualifying bond, whereas the judgment of the State Court was not limited to the qualifying bond but was against all property of respondent-appellee, and the appeal bond was a new, separate and distinct obligation on the part of respondent-appellee conditioned that it should prosecute the appeal or the surety be held liable in its place.

XXII.

Petitioner further avers that the Circuit Court of Appeals erred in refusing to follow the law of Louisiana as decided by the Supreme Court of Louisiana, in case No. 32,960 of the Supreme Court of Louisiana, entitled "Etienne Dugas vs. New York Casualty Co." (R. 56, *et*

seq.), relative to the nature and obligations of appeal bonds under the statutes of Louisiana and the liability of principal and surety thereunder.

Petitioner further alleges that the reasons relied upon for the allowance of this writ are that the opinions and decrees of the District Court for the Eastern District of Louisiana and the Circuit Court of Appeals for the Fifth Circuit, handed down herein, have decided an important question of local law in a way in conflict with applicable local decisions and have decided an important question of general law in a way untenable and in conflict with the weight of authority.

XXIII.

Your petitioner, therefore, respectfully submits that these questions of important local and general law should be finally and authoritatively adjudged by this Court upon and after a full presentation to the Court of the merits of said questions on the part of petitioner and respondent.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case herein, numbered 7961, entitled "Etienne Dugas vs. American Surety Company of New York" to the end that said case may be reviewed and determined by this Court as provided in Section 347, Title 28, United States Code, or that your peti-

tioner may have such other or further relief or remedy in the premises as this Honorable Court may deem appropriate and in conformity with law, and that the judgment of the said Circuit Court of Appeals be reversed by this Honorable Court.

And your petitioner will ever pray.

M. C. SCHARFF,
Attorney for Petitioner.

JAMES J. LANDRY,
IGNATIUS E. UZZO,
WILLIAM C. ORCHARD,
Of Counsel for Petitioner.

AFFIDAVIT.

STATE OF LOUISIANA }
PARISH OF ORLEANS }

Personally came and appeared before me, the undersigned Notary Public, duly commissioned and qualified in and for the Parish of Orleans, State of Louisiana, JAMES J. LANDRY, who after being duly sworn deposes and says:

That the petitioner, Etienne Dugas, is absent from the City of New Orleans and it is not convenient for him to make this affidavit; that your affiant has been one of the attorneys for petitioner in his litigation with the American Surety Company of New York and the New York Casualty Company since the inception of the litigation; that he is personally familiar with and has knowledge of all the facts and allegations set forth in this petition and that the same are true and correct.

JAMES J. LANDRY.

Sworn to and subscribed before me,
this 31 day of August, 1936.

CHARLES W. KEHL,
Notary Public.
(Seal)

CERTIFICATE.

I, M. C. Scharff, attorney for Etienne Dugas, petitioner herein, do hereby certify that, in my opinion, the application for the Writ of Certiorari is well founded in Law and is not filed for the purpose of delay.

M. C. SCHARFF.

New Orleans, Louisiana,
August 31, 1936.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported at page 953 of the 82 Federal, Second Series.

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Louisiana appear at pages 103 to 107 of this Record.

Jurisdiction.

This application to this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is made under the provisions of Section 347, Title 28 of the United States Code.

Statement of the Case.

The case is fully and completely stated in petitioner's accompanying petition for a writ of certiorari and in the opinion of the Circuit Court of Appeals at pages 119 to 124 of the record, both inclusive. As a certain part of the case must be stated in the argument, we will make no further statement here.

Specifications of Error.

1. That said Circuit Court of Appeals erred in holding that the supplemental proceedings herein were ancillary to the original interpleader suit and thus within the jurisdiction of the District Court.

2. That the said Circuit Court of Appeals erred in holding that the right established in favor of respondent was inconsistent with petitioner's right to enforce against the surety on the state court appeal bond his judgment against respondent on petitioner's claim for workman's compensation.

3. That the said Circuit Court of Appeals erred in holding that the appeal bond was an incident of the suit brought by petitioner against respondent for the full amount of his claim and was a means of effecting the enforcement of that claim.

4. That the said Circuit Court of Appeals erred in holding the liability under the appeal bond was a liability on account of the qualifying bond and that it came within the scope of the decree discharging respondent from all liability on the qualifying bond.

5. That the said Circuit Court of Appeals erred in holding that the proceeding against the surety on the appeal bond was an indirect method of proceeding against respondent on the qualifying bond.

6. That the said Circuit Court of Appeals erred in holding that the decree of the District Court did not go beyond giving due effect to the final decree in the interpleader suit.

ARGUMENT.

The opinion of the Supreme Court of Louisiana in the very suit enjoined by the decree in this proceeding and here complained of, namely, the case of *Etienne Dugas v. New York Casualty Co.*, reported in the *181 La., p. 322, 159 So. 572*, R. pp. 56-66, and the dissenting opinion in the Circuit Court of Appeals in this case by Hon. S. H. Sibley, Circuit Judge, set out herein in the record at pages 127-130, fully cover the contentions of petitioner and his argument thereon and correctly stated the correct principles of law applicable to this case.

The sole question to be decided here is whether the suit by petitioner against the New York Casualty Company on the State court appeal bond executed by respondent is a violation of the prior decree of the District Court in the original interpleader suit of respondent on the $20,000 qualifying bond.

It may be stated at the outset that the New York Casualty Company is not and has never been a party to either the original interpleader suit or the so-called supplemental proceeding.

The suit by petitioner against the New York Casualty Company is based on the following cause of action. Before the American Surety Company filed the original interpleader suit in the Federal District Court, petitioner had obtained a money judgment against the American Surety Company on his workman's compensation claim. This judgment was not limited to the qualifying bond, the

basis of the interpleader suit, but was a general judgment against all of the property of respondent. After the obtaining of this judgment by petitioner in the State Court against respondent, respondent did not at once attempt to invoke the remedy of an interpleader suit. On the contrary, they sought to delay and prevent the enforcement by petitioner of his general judgment against all of the property of respondent. This was accomplished by executing, furnishing and filing a suspensive appeal bond, in accordance with the statutory provisions of Louisiana law, with the New York Casualty Company as surety on the appeal bond, in connection with the appeal of the American Surety Company.

Before the appeal was heard by the Louisiana court of appeals, respondent filed the original interpleader suit, citing petitioner with numerous other claimants and depositing in Court $20,000 to cover its obligations under the qualifying bond of the Lumbermen's Association. Petitioner objected to his inclusion in the interpleader suit but his objections were overruled by the District Court. As petitioner interpreted this decision as not affecting his rights under the appeal bond, he proved his claim in the interpleader suit in order to minimize the damages of the New York Casualty on the state court appeal bond. Petitioner collected his pro rata share of the distribution in the interpleader suit. In the final decree in the interpleader suit petitioner was enjoined "from instituting or prosecuting in any State Court, or in any other Federal Court, any suit against said American Surety Company of New York on account of any right or claim growing out of said bond, or any similar previous bond. (R. 32-33).

Petitioner then brought suit in the State Court against the New York Casualty Company as surety on the appeal bond for the balance due on his claim as found by the Master in the Federal Court. His demand was later remitted to $2999.00 to forestall removal proceedings. Petitioner brought this suit on the grounds that the filing of the interpleader suit was an abandonment of the appeal and a breach of the appeal bond. This action was approved by the decision of the Louisiana Supreme Court in *Dugas v. N. Y. Casualty Co., supra.*

The New York Casualty Company filed in the State Court exceptions of prematurity, vagueness, estoppel by reason of the Federal interpleader proceedings and of no right or cause of action. The trial Court sustained the plea of prematurity, not passing on the other questions raised. On appeal by petitioner to the Supreme Court of Louisiana, the decision of the lower Court was reversed and the case remanded. The New York Casualty Company applied for a rehearing of this decision which was denied. However, before the denial of the rehearing, respondent filed its so-called supplemental bill in the Federal District Court to enjoin petitioner from proceeding against the New York Casualty Company in h[illegible] State Court suit on the appeal bond. Respondent objected to the jurisdiction of the District Court, filed pleas of estoppel and of no right or cause of action. All were overruled and a preliminary and permanent injunction granted in regular course enjoining petitioner from prosecuting his suit in the State Court against the New York Casualty Company as surety on the appeal bond. Judgment was affirmed by

the Circuit Court of Appeals, Sibley, Circuit Judge, dissenting.

The so-called supplemental bill and proceedings herein were not ancillary to the original interpleader suit and was thus not within the jurisdiction of the District Court. It is the contention of petitioner that his suit against the New York Casualty Company as surety on the state court appeal bond was dissimilar from any action or proceedings on the bond or bonds covered by the interpleader decree.

Undoubtedly, the Federal District Court has the right to inquire into a possible violation of its prior injunctive decree in the interpleader suit, but petitioner's suit against the New York Casualty Company on the state court appeal bond was a proceeding based upon a new, separate and distinct obligation from the qualifying bond in the interpleader suit.

Let us consider the Louisiana statutes under which the appeal bond was furnished and the interpretations of those statutes and of the rights and obligations of the parties affected by the appeal bond. The decision of the Louisiana Supreme Court in the very suit enjoined herein, cited above, fully construes the operation and effect of these statutes governing suspensive appeal bonds.

Article 575, Code of Practice of Louisiana, provides:

> "If the appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit - - - it shall stay execution and all further proceedings,

> until definitive judgment be rendered on the appeal, provided the appellant gives his obligation, with good and solvent security, - - - as security for the payment of the amount of such judgment in case the same is affirmed by the Court to which the appeal is taken."

The judgment of petitioner was a general judgment against all the property of respondent and was not limited to the qualifying bond. So in order to delay and prevent the execution of petitioner's judgment, respondent took a suspensive appeal under the provisions of the above quoted statute. To obtain the benefits of the stay of execution and proceedings granted by the statute, respondent had to comply with two essential requirements: 1st, the appeal must be taken in ten days and 2nd, an appeal bond had to be given. The appeal bond was not an incident of the suit brought by petitioner, as was held by the majority opinion of the Circuit Court herein, and was not a means of effecting the enforcement of the claim of petitioner. On the contrary, the giving of the appeal bond by respondent was mandatory under the statute to prevent and delay the enforcement of petitioner's claim. Therefore, in order, "to stay execution and all further proceedings, until definitive judgment be rendered on the appeal" respondent as principal and New York Casualty Company executed a new obligation, a new contract in favor of petitioner.

What were the terms of that new contract? The statute setting forth the terms and conditions of the bond is *Article 579 of the Code of Practice of Louisiana*, which reads:

> "In the appeal bond it must set forth in substance, that it is given as surety that the appellant shall

> prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise that the surety shall be liable in his place."

This statute is written into every suspensive appeal bond executed in the Courts of Louisiana. Let us see if respondent and its surety on its appeal bond, executed to prevent the seizure of all its property, complied with the terms and conditions of their statutory appeal bond. Before the hearing on the appeal by the State Court of Appeals, respondent filed his interpleader suit in the Federal District Court. Its surety on the appeal bond was not a party to that proceeding or to any proceeding in the Federal Court. Dugas was ordered to set up his claim against the qualifying bond, but did not in any way seek to establish his rights under the appeal bond as the New York Casualty Company, surety thereon was not a party to the interpleader proceedings.

After the conclusion of the original interpleader suit, petitioner brought suit against New York Casualty Company as surety on the appeal bond on the ground that the filing of the interpleader suit was an abandonment by respondent of its appeal and a breach of the terms and conditions of the appeal bond which rendered the surety liable. This contention was approved in this very case by the Louisiana Supreme Court in *Dugas v. New York Casualty Company, 181 Louisiana 322, 159 Southern 572*, and in record herein at pages 59, 60, 61.

This decision interpreting the statute relating to appeal bonds and the breach of their terms and conditions by the Louisiana Supreme Court settles the question for the Federal Courts.

In that case in an exhaustive and able opinion the Louisiana Supreme Court held in part:

> "The conditions of the appeal bond on which this suit is founded are precisely in accord with the terms prescribed in article 579 of the Code of Practice, viz: 'That it is given as surety that the appellant shall prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise that the surety shall be liable in his place.' The first obligation on the part of an appellant, in order to save the surety from liability on the appeal bond, is 'that the appellant shall prosecute his appeal'. If he prosecutes his appeal, he must also 'satisfy whatever judgment may be rendered against him, * * * otherwise the surety shall be liable in his place'. But the appellant may render the surety liable as well by abandoning his appeal, as by prosecuting the appeal and then failing to satisfy whatever judgment may be rendered against him. It was so decided in Champonier v. Washington, 2 La. Ann. 1013. In that case the appeal was declared abandoned by the failure of the appellant to file the transcript before the expiration of the return day. See Champonier v. Washington, 2 La. Ann. 722. The plaintiff then proceeded against the surety on the appeal bond, and he pleaded that the plaintiff had no right to proceed against him 'because the judgment against Washington, from which the appeal was taken, was not affirmed by this [the Supreme] Court'. The

Court held that, as the appellant had not prosecuted his appeal, but had abandoned it, the obligation for which the surety was liable on the appeal bond was to pay the judgment appealed from. In so deciding the Court said:

> 'Where an appellant abandons his appeal, the surety on the appeal bond cannot exempt himself from responsibility on the ground that "the judgment appealed from has not been affirmed", as contemplated by sec. 20 of the stat. of 20 March, 1839, and arts. 575, 596, of the Code of Practice. Percuriam: The condition of the appeal bond, following literally the requisition of art. 579 of the Code of Practice, was "that the appellant shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him", &c. The appellant did not prosecute his appeal, and the condition of the bond was thus broken.'

That decision was cited with approval in Moore, Janny & Hyams v. Lalaurie, 27 La. Ann. 1013, and in Rowle v. Feltus, 33 La. Ann. 422, and in Russ & Hollingsworth v. Their Creditors, 45 La. Ann. 422, 12 So. 627; in which cases it was held that an appeal bond which did not contain the obligation or condition that the appellant should prosecute his appeal was not a valid appeal bond. To the same effect see the editorial note to Woodle v. Settlemeyer, L. R. A. 1915 A, p. 845, III, and Ann. Cas. 1916 C, p. 1228.

The American Surety Company in this instance, abandoned the appeal which the company had taken from the judgment of the Civil District Court to the Court of Appeal for the Parish of Orleans, when the Company went into the United States District Court and enjoined Dugas from prosecuting his suit, then pending in the Court of Appeal. It is argued by counsel for the New York Casualty Company that the American Surety Company did not

abandon its appeal, but, on the contrary, satisfied the judgment appealed from, by depositing in the United States District Court the amount of the $20,000 bond on which the suit was founded. That would be true, perhaps, if the judgment which Dugas had obtained against the American Surety Company had been limited in its terms so that he could collect only a proportionate share of the amount of the $20,000 bond on which the suit was brought. But the judgment which Dugas held against the American Surety Company was unqualified in that respect, and was exigible against any property belonging to the company. The judgment was a final judgment, not subject to annulment or amendment except by the Court having appellate jurisdiction. Code of Prac. Art. 539, 565. And the execution or collection of the judgment was prevented only by the suspensive appeal, and on the condition that the appellant, American Surety Company, should prosecute the appeal, and should satisfy whatever judgment might have been rendered against the company, or that the surety on the appeal bond, the New York Casualty Company, should be liable in its place. The expression in the article of the code, 'that the surety shall be liable in his place', means that the surety shall be liable for whatever judgment the principal on the bond shall be liable for; that is, the judgment of the appellate Court if the appellant prosecutes his appeal, or the judgment appealed from if the appellant abandons the appeal. Any other interpretation would render a suspensive appeal bond worthless in the case of an abandonment of an appeal from a money judgment. And any other interpretation would contradict the very language of the bond, 'that the appellant shall prosecute his appeal.' "

The New York Casualty Company's obligation under the bond, according to the decision of the Louisiana

Supreme Court was to see that the American Surety Company prosecuted the appeal in accordance with the statutory terms and conditions of the appeal bond or to pay the amount of the judgment in its place. It was a separate and distinct undertaking from that of the American Surety Company in favor of petitioner. Can courts of equity grant a release from the plain and positive terms of a contract not charged to have been entered into by fraud or violence? And without all of the parties to that contract being made parties to such action? Will they release a party from a solemn and sacred bond whose statutory terms and conditions were well known to the surety and principal thereon and which bond was executed freely and knowingly by the parties thereto in favor of the petitioner, and which bond is the sole and only law between them without reference to any other bond or bonds?

When the American Surety Company induced the New York Casualty Company to sign as its surety on the appeal bond, it did so with full knowledge of the statutory law of the State and of the effect and purpose of the contract. The appeal bond was voluntary as to the American Surety Company and the New York Casualty Company, but was forced so far as Dugas was concerned, because, whilst the American Surety Company before filing that bond could have either stayed the judgment by paying, or have its interpleader proceeding or have permitted Dugas to levy execution. It chose to prosecute an appeal and by filing of the motion and the bond, which is the subject of this litigation, it chose that course, and when it did, Dugas was forced to accept because he could do noth-

ing except to question the validity of the bond in the proceedings for appeal thereafter.

By the jurisprudence of Louisiana, established in 1822, in a case wherein a litigant proceeded directly against the surety on an appeal bond in *Baldwin v. Gordon, et al., 12 Mart. (O. S.) 378*, Supreme Court of the State of Louisiana passing on a very similar question said:

> "The principal debtors were not excused from carrying up this appeal by the decree in that case. Either the judgment obtained in the first instance against them, was correct, or it was not. If it was correct, they should not have appealed from it. If it was erroneous, they ought to have prosecuted their appeal with effect. And if they failed to do so, they have not only revived that original judgment, but they have made themselves responsible on the new contract, by which they engaged they would reverse the judgment, or satisfy it.
>
> But it is said, that by the order of the district court, the whole of the property belonging to the succession was directed to be sold, and therefore prosecuting the appeal was unnecessary. This conclusion cannot receive our assent. It is true, the placing the property out of the reach of a creditor, who wished to seize upon it to the injury of others, may have been the object for which the defendants appealed. But the object which they had, in appealing, is a quite distinct question, from the rights acquired by the plaintiff under the contract formed by that step. And, although attaining the end they had in view, by a decree in another suit to which the plaintiff was not a party, may have answered their purpose, yet it does not discharge their bond; for the condition of it was not that they would obtain a decree of the district court, but that they would prosecute their appeal with success; and this brings us to the next and last question in the cause, whether the principal

debtor, being placed in a situation in which she cannot make payment, recourse can be had against the surety.

The surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt, not those which are personal to the debtor. Civil Code, 432, art. 21. Pothier distinguishes them into exceptions in personam, and exceptions in rem. The latter, which go to the contract itself, such as fraud, violence, or whatever entirely avoids the obligations, may be pleaded by the surety; but the former, which are grounded on the insolvency or partial solvency of the debtor, or which result from a cession of his property, or are the consequence of his minority, cannot be opposed to the creditor. Pothier on Obligations, 380, 381. In the case before us, the objection that, since executing this bond, one of the principal debtors has obtained from a court of competent jurisdiction, an order directing a sale of all the property of the succession she represents, and by that means suspending the payment of debts due by it, cannot be distinguished from the case of partial solvency put by the author to whom we have referred."

That theory has been pursued throughout the jurisprudence of this State down to the case of Dugas against the New York Casualty Company, the proceedings which are enjoined herein.

It is difficult to conceive how the principal on the appeal bond was discharged from liability, if any, to the surety on that bond, but even if that be true the conclusion cannot be escaped that Dugas was by that contract deprived of his right to acquire a privilege by levying a seizure on the property of the American Surety Company

and thus be able to recover on his whole claim. The New York Casualty Company knew this, as well as the American Surety Company, and it would seem to be unconscionable to permit now, the American Surety Company to prevent Dugas from enforcing his right under that contract, certainly as against the New York Casualty Company.

The decree of the District Court in the interpleader suit was "that all defendants be and they are hereby perpetually restrained and enjoined from instituting or prosecuting in any State Court or any other Federal Court any suit against the American Surety Company on account of any right or claim growing out of said bond ($20,000 qualifying bond) or any similar previous bond." (Parenthesis ours). As was well said by Judge Sibley in his dissenting opinion, (R. 127) "The injunction does not cover a suit on a subsequent appeal bond which American Surety Company had given as principal, with the New York Casualty Company as surety. Such bond is altogether dissimilar from the bonds mentioned in the decree."

The Supreme Court of Louisiana in the case of *Dugas v. New York Casualty Company, supra*, holds the same opinion. Their finding is quoted with approval by Judge Sibley at page 128-129 of the record, which is as follows:

> "The United States court did not in its decree undertake to destroy or limit Dugas' right of action against New York Casualty Company as surety on the appeal bond which was given to suspend the execution and to secure the payment of the judgment rendered by the District Court for the Parish of Orleans. We must bear in mind that this suit is not founded on the qualifying bond of $20,000 which the American Surety Company signed as

surety for Lumbermen's Reciprocal Association, but is founded upon the suspensive appeal bond for $10,000 which the New York Casualty Company signed as surety for the American Surety Company. The $20,000 qualifying bond passed out of the case when the American Surety Company abandoned its appeal in that suit on that bond, and thereby rendered the New York Casualty Company liable as surety on the $10,000 appeal bond". . . . "It is true that if the New York Casualty Company has to pay, and if the American Surety Company has to reimburse the New York Casualty Company, the American Surety Company will have paid out more than the amount of the $20,000 qualifying bond. But that happened in Mrs. Brim's case and in the Lyon Lumber Company case, (American Surety Co. v. Brim, et al., 176 La. 867, 147 So. 18), as a consequence of the failure of the American Surety Company to provoke an interpleader suit until plaintiff in each of those cases had obtained a final judgment against the American Surety Company (on suspensive appeal); and by the same token it may happen in this case."

The whole situation is aptly and correctly summarized by Judge Sibley in his dissenting opinion at pages 129-130 of the Record, as follows:

"Had American Surety Company when Dugas obtained judgment against it at once filed its interpleader, all its obligations to Dugas would have been ended. But it saw fit to appeal, and to arrest execution of the general judgment against it by giving another obligation for its payment. The consideration of the appeal bond was the delay to be obtained. That consideration was enjoyed, and the bond as a collateral obligation stands good according to its terms. According to those terms the bond has been breached, and the liability on it has become absolute."

The Circuit Court of Appeals quotes with approval a conclusion of law by the District Court that the attempt to collect from the surety on the state court appeal bond is an indirect method of proceeding against the principal on said bond. From the undisputed facts in this case, can not the belated attempt to absolve the New York Casualty Company by the New York Surety Company through its self-styled supplemental bill, be termed an indirect attempt to defeat a fair and well considered judgment of the state court having jurisdiction of the subject matter, and to rectify their failure and laches to properly exercise their remedy of interpleader at the proper time.

We cannot find a better conclusion than that of Judge Sibley (R. 130) **"The bond is the price of a delay which was enjoyed.** I think the District Court erred in interfering with its enforcement in the State Court."

WHEREFORE, petitioner prays, That his petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Fifth Circuit be granted, and that after a full hearing on the merits, the judgment of the Circuit Court of Appeals be reversed.

And for all necessary and appropriate relief in the premises.

Respectfully submitted,

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